

The Honorable Ralph R. Beistline

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSHUA ALAN WADE,

Defendant.

No. 3:07-cr-0111-RRB-JDR

MEMORANDUM IN SUPPORT OF  
MOTION TO SHOW CAUSE WHY THIS  
COURT SHOULD NOT DISMISS ALL  
COUNTS BECAUSE OF THE  
ANCHORAGE CORRECTIONAL  
COMPLEX'S CONTINUING  
VIOLATIONS OF WADE'S RIGHT TO  
COUNSEL

**FACTS**

The Anchorage Correctional Complex is violating Wade's right to communicate confidentially with his counsel. On October 28, 2009 counsel sent via FedEx a package of correspondence to Mr. Wade. That mail was marked in red ink "special legal mail open only in presence of inmate." Mr. Wade received the package opened and on the front of it was a post-it-note that was reproduced on my copies, which states "Opened by mistake. Mailroom." See Exhibit 1.

SEALED MEMO IN SUPPORT OF MOTION TO  
EXCLUDE EXPERT TESTIMONY RE: ZIP TIES – 1

U.S. V. WADE, NO. 3:07-CR-0111-RRB-JDR

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1 On November 5, 2009, Mr. Wade received correspondence from counsel. He  
 2 received it in a large manila envelope. The shipping address had been cut so that one could  
 3 not see the special legal mail stamp. In addition the materials had been removed from the  
 4 FedEx envelope and placed in a totally separate envelope. *Id.*

5 On December 7, 2009, counsel sent a large stack of materials to Wade. The  
 6 envelope and cover letter clearly identified the materials as covered by the attorney-client  
 7 privilege. That letter was once again opened and repackaged by the mailroom before being  
 8 delivered to Wade on December 11, 2009.

### 9 ARGUMENT

10 Effective representation requires that a criminal defendant be permitted to confer  
 11 in private with his or her attorney. Opening legal mail in presence of inmates, without  
 12 reading it, accommodates prison's security concerns while protecting inmates' right to  
 13 private communications with attorneys. *Wolff v. McDonnell*, 418 U.S. 539, 576-77  
 14 (1974). In this case, however, the Anchorage Correctional Complex has continued to  
 15 open, examine and repackage Wade's mail outside his presence.

16 The Ninth Circuit has held that "government interference with a defendant's  
 17 relationship with his attorney may render counsel's assistance so ineffective as to violate  
 18 ... his Fifth Amendment right to due process of law." *United States v. Irwin*, 612 F.2d  
 19 1182, 1185 (9th Cir. 1980). "[A] claim of outrageous government conduct premised upon  
 20 deliberate intrusion into the attorney-client relationship will be cognizable where the  
 21 defendant can point to actual and substantial prejudice." *United States v. Haynes*, 216  
 22 F.3d 789, 797 (9th Cir. 2000) (quoting *United States v. Voigt*, 89 F.3d 1050, 1067 (3rd  
 23 Cir. 1996)). A claim of government interference with the attorney-client relationship has  
 24 three elements: (1) the government was objectively aware of an ongoing, personal  
 25

attorney-client relationship; (2) the government deliberately intruded into that relationship; and (3), as a result, the defendant suffered actual and substantial prejudice. *Voigt*, 89 F.3d at 1067.

The Anchorage Correctional Complex employees' conduct is clearly a violation of *Wolff* and Alaska DOC Policy 808.01 VIII (D) which provides that: "The Department may open and search legal correspondence for contraband only in the presence of the defendant." In addition, it is a federal crime for any unauthorized person to open mail. 18 U.S.C. § 1703.

Counsel has attempted to remedy this problem with the jail administration to no avail. Exhibit 1.

### CONCLUSION

For the foregoing reasons, this Court should order the Anchorage Correctional Complex administration to appear and show cause why these charges should not be dismissed because of continuing violations of Wade's right to counsel.

DATED this day 16th of December, 2009.

/s/Suzanne Lee Elliott  
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### CERTIFICATE OF SERVICE

I, SUZANNE LEE ELLIOTT, hereby certify that on December 16, 2009, I filed foregoing document with the United States District Court's Electronic Case Filing

SEALED MEMO IN SUPPORT OF MOTION TO  
EXCLUDE EXPERT TESTIMONY RE: ZIP TIES – 3

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1 (CM/ECF) system, which will serve one copy by email on Assistant United States  
2 Attorney STEVEN SKROCKI and STEVE COOPER.

3  
4 /s/Suzanne Lee Elliott  
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SEALED MEMO IN SUPPORT OF MOTION TO  
EXCLUDE EXPERT TESTIMONY RE: ZIP TIES – 4

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